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**FOURTH AMENDMENT SEARCHES – WITH LIBERTY AND
JUSTICE FOR ALL . . . UNLESS YOU CHOOSE TO FLY:
*TORBET V. UNITED AIRLINES, INC.***

DEBORAH LAWSON*

IN *TORBET v. United Airlines, Inc.*,¹ the Ninth Circuit Court of Appeals affirmed a California district court,² holding that “the Fourth Amendment permits a random search, at an airport security checkpoint, of a carry-on bag that has passed through an x-ray scan without arousing suspicion that the bag contains weapons or explosives.”³ Continued erosion of the Fourth Amendment’s protection from “unreasonable searches and seizures”⁴ is resulting in a return to the general warrant searches that the Fourth Amendment was designed to combat. The Ninth Circuit ignored the prophetic warning, “[h]istory reveals that the initial steps in the erosion of individual rights are usually excused on the basis of an ‘emergency’ or threat to the public. But the ultimate strength of our constitutional guarantees lies in their unhesitating application in times of crisis and tranquility alike.”⁵ A random, physical search of a passenger’s carry-on bag, following an x-ray scan that did not raise suspicion is unconstitutional because the random, physical search is unreasonable, the procedures are unknown, and consent is not given.

In October 1998, Hugo Torbet, after passing his carry-on bag through the x-ray scan and walking through the metal detector without raising suspicion, was selected for a random, physical search pursuant to a policy of randomly, hand-searching bags

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¹ *Torbet v. United Airlines, Inc.*, 298 F.3d 1087 (9th Cir. 2002).

² *Torbet v. United Airlines, Inc.*, No. CV-99-12354-AHM (C.D. Cal. 1999).

³ *Torbet*, 298 F.3d at 1088.

⁴ U.S. CONST. amend. IV.

⁵ *United States v. Edwards*, 498 F.2d 496, 502 (2d Cir. 1974) (Oakes, J., concurring) (quoting *United States v. Bell*, 464 F.2d 667, 676 (2d Cir. 1974) (Mansfield, J., concurring)).

even if the electronic search raised no suspicion of weapons or explosives.⁶ When Mr. Torbet refused to submit to the additional physical search and asked to leave the airport, Police Officer Mike Edwards informed him that he was not free to leave until after the search was completed.⁷ Eventually, Mr. Torbet's bag was searched, nothing was discovered, and Mr. Torbet was allowed to catch his flight.⁸

However, one year after the incident, Torbet, a lawyer, sued United Airlines, the Board of Airport Commissioners, the City of Los Angeles, and Officer Edwards, for violating his civil rights under 42 U.S.C. § 1983, false imprisonment, invasion of privacy, and negligence.⁹ Torbet challenged the policy of randomly searching bags that did not arouse suspicion, claiming loss of dignity and emotional distress as a result, and sought \$1,000,000 in damages.¹⁰

In December 2000, the United States District Court for the Central District of California granted the defendants' motion on the pleadings noting that random physical searches are authorized by the Federal Aviation Administration's (FAA) confidential security procedures¹¹ and that the search is constitutional because an air traveler "impliedly consent[s] to the search by placing his bag on the x-ray belt."¹² The court further concluded that its holding preempted Torbet's state law claims.¹³ On appeal, Torbet challenged only the district court's holding regarding his civil rights claim, arguing that "random post-x-ray searches are facially invalid, in the absence of express consent, unless the x-ray scan arouses suspicion."¹⁴

The Ninth Circuit relied on a faulty argument to determine that because the district court found the confidential procedures in place at the time Mr. Torbet was searched reasonable, the resulting random, physical search was constitutional. The Ninth Circuit's analysis is based on the presumption that a pas-

⁶ *Torbet*, 298 F.3d at 1088.

⁷ *Id.*

⁸ *Id.*

⁹ *Id.*

¹⁰ *Id.*

¹¹ The court originally ordered production of the security procedures under a protective order; however, the court later modified that order to allow production "under seal, only for the court's *in camera* review." To date, neither Torbet, nor his counsel, have been permitted to view the procedures. *Id.* at 1088-89.

¹² *Id.* at 1089.

¹³ *Id.*

¹⁴ *Id.*

senger who places his bag on the x-ray conveyor belt consents to a random, physical search; when in reality, the passenger has not consented to any search, or alternatively has consented only to the x-ray search and not the random, physical search.¹⁵ Furthermore, this circuitous reasoning goes against the Ninth Circuit's prior holding that "a generalized law enforcement search of all passengers as a condition for boarding a commercial aircraft would plainly be unconstitutional."¹⁶

The Ninth Circuit began its analysis by stating that "[a]n airport screening search is reasonable if: (1) it is no more extensive or intensive than necessary, in light of current technology, to detect weapons or explosives; (2) it is confined in good faith to that purpose; and (3) passengers may avoid the search by electing not to fly."¹⁷ However, the passenger must elect not to fly "before placing his bag on the x-ray belt," because once the passenger places his bag on the x-ray machine's conveyor belt, the passenger impliedly consents to the search.¹⁸ Furthermore, an x-ray scan is "inconclusive, justifying further search, even when it doesn't affirmatively reveal anything suspicious."¹⁹ Therefore, according to the court, because a passenger consents to an x-ray search of his bag that will never be conclusive, the passenger has consented to a random, physical search of his belongings, and thus, that search is constitutional because the passenger consented to the original x-ray search. This reasoning is flawed and the outcome is a violation of liberty. As the late Justice Brandeis noted:

Experience should teach us to be most on our guard to protect liberty when the Government's purposes are beneficent . . . The greatest dangers to liberty lurk in insidious encroachment by men of zeal, well-meaning but without understanding.²⁰

First, a search to detect weapons and explosives cannot be considered reasonable if it has proven to be completely incapable of detecting weapons and explosives. In other words, to be

¹⁵ *Id.* at 1088; *see also Edwards*, 498 F.2d at 505.

¹⁶ *United States v. \$124,570 U.S. Currency*, 873 F.2d 1240, 1243 (9th Cir. 1989) (citing *United States v. Davis*, 482 F.2d 893, 910 (1973)).

¹⁷ *Torbet*, 298 F.3d at 1089 (quoting *Davis*, 482 F.2d at 913).

¹⁸ *Id.* (citing *United States v. Pulido-Baquerizo*, 800 F.2d 899, 901-02 (9th Cir. 1986)). *Contra United States v. Albarado*, 495 F.2d 799, 807-08 (2d Cir. 1974) ("Even after activating the magnetometer, the prospective passenger may refuse to submit to a frisk and instead forfeit his ability to travel by air . . .").

¹⁹ *Torbet*, 298 F.3d at 1089.

²⁰ *Olmstead v. United States*, 277 U.S. 438, 479 (1928) (Brandeis, J., dissenting).

reasonable, "no matter the threat, the search to counter it will be as limited as possible, consistent with meeting the threat."²¹ A search that is inconclusive in 100% of the cases, necessitating the use of a further search, is not narrowly achieving its end, and thus, cannot withstand the first prong of the court's test because it is more extensive or intensive than necessary, in light of current technology, to detect weapons or explosives.

Second, the alleged governmental purpose of the search is to deter passengers from carrying weapons and explosives,²² a function adequately served by the x-ray scan. The random, physical search goes beyond that purpose because the so-called security searches are used as general warrants to search for items other than weapons and explosives, such as illegal money and drugs,²³ the scenarios of suspicionless searches the Fourth Amendment was intended to combat.²⁴ Although deterrence is a legitimate and substantial governmental purpose, "that purpose cannot be pursued by means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved."²⁵ The mandatory x-ray search of every passenger's carry-on bags narrowly achieves the governmental purpose of deterring "potential hijackers from even attempting to bring weapons on a plane."²⁶ When the x-ray scan arouses suspicion, due to an indeterminate shadow or outline, probable cause has been raised and a physical search becomes reasonable.

However, a random, physical search of a passenger's carry-on bag, following an inconclusive x-ray scan, is not confined to searching for weapons and explosives because courts hold that once the bag is opened, other contraband becomes fair game.²⁷ In 1974, the Second Circuit recognized the use of x-ray technology at security checkpoints as "'inefficient' in that all passengers are searched, but only a fraction of one percent have weapons, [yet] up to 50 per cent of the passengers passing through a mag-

²¹ *Albarado*, 495 F.2d at 806.

²² *Id.* at 807-08.

²³ See \$124,570 *U.S. Currency*, 873 F.2d at 1241 (finding illegal currency); *Pulido-Baquerizo*, 800 F.2d at 901 (finding cocaine); *Albarado*, 495 F.2d at 801 (finding counterfeit currency).

²⁴ The Framers of the Constitution added the Fourth Amendment to protect citizens from overzealous constables who would procure general warrants rather than risk an action for false arrest. See *Edwards*, 498 F.2d at 503.

²⁵ *Davis*, 482 F.2d at 912-13 (quoting *Shelton v. Tucker*, 364 U.S. 479, 488 (1961)).

²⁶ *Albarado*, 495 F.2d at 804.

²⁷ \$124,570 *U.S. Currency*, 873 F.2d at 1247.

netometer may activate it.”²⁸ The court predicted that, although the search system was justified originally, it would “eventually remain without an actual, existing threat to justify it . . . degenerat[ing] from the original search for weapons to a general search for contraband.”²⁹ This is exactly what has happened. Accordingly, in 1989, the Ninth Circuit refused to justify an airport screening system that paid security personnel for reporting “any sum of currency over \$10,000 to the United States Customs Service and Airport Police,”³⁰ noting that:

It is the very ubiquitousness of airport security checks that calls for the greatest vigilance on our part. Because these checks touch the lives of so many, because they have become such an accepted part of our existence, they are capable of great abuse. Liberty—the freedom from unwarranted intrusion by government—is as easily lost through insistent nibbles by government officials who seek to do their jobs too well as by those whose purpose it is to oppress; the piranha can be as deadly as the shark.³¹

Third, the Ninth Circuit dismisses the impropriety of the search by flippantly holding that “passengers may avoid the search by electing not to fly.”³² In the twenty-first century, this is simply not a viable option. An American citizen should not be forced to choose between two constitutional rights: the right to travel³³ and the right to remain free from unreasonable searches.³⁴ In 1973, when the Ninth Circuit decided *Davis*, there were legitimate alternatives to flying. At that time, flying was expensive and limited to a small class of people. Today, almost thirty years later, “[a]irplane travel has become the lifeblood of American society.”³⁵ Furthermore, as noted in *Pulido-Baquerizo*, the court in *Davis* did not draw a line beyond which a passenger “may decide not to fly and thereby withdraw his implied consent.”³⁶ In fact, the court expressly refrained from

²⁸ *Albarado*, 495 F.2d at 805.

²⁹ *Id.* The court noted that “[l]ess than 20 per cent of the arrests resulting from the anti-hijacking system have been for offenses related to aircraft security.” *Id.* at 805 n.12.

³⁰ *\$124,570 U.S. Currency*, 873 F.2d at 1241, 1248.

³¹ *Id.* at 1246.

³² *Torbet*, 298 F.3d at 1089 (quoting *Davis*, 482 F.2d at 913).

³³ *Kent v. Dulles*, 357 U.S. 116, 127 (1958) (“Freedom to travel, is indeed, an important aspect of the citizen’s ‘liberty.’”).

³⁴ U.S. CONST. amend. IV.

³⁵ *\$124,570 U.S. Currency*, 873 F.2d at 1242.

³⁶ *Pulido-Baquerizo*, 800 F.2d at 902 (citing *Davis*, 482 F.2d at 913).

drawing that line for thirteen years.³⁷ Yet, the court in *Pulido-Baquerizo* drew the line at the time when a passenger places his bag on the x-ray conveyor belt.³⁸

In addition, the random nature of the search is suspect. Modern courts reject the use of racial profiling, and without published procedures to ensure that racial profiling is not being used to determine the "random" passenger, a random, physical search cannot possibly pass constitutional muster. As the Pennsylvania Supreme Court noted, detailing the proper process and scope of the search not only prepares those being searched, but also "provides a check on those conducting the search not to exceed their limited authority."³⁹ Even the Second Circuit's Judge Henry J. Friendly, while extolling the virtues of the "FAA anti-hijacking program," admitted that the scope of the search must be reasonable and the passenger must have been given "advance notice of his liability to such a search."⁴⁰ But, knowledge that some search may be conducted is not enough. The passenger must know the process and scope of the search so that he can make an informed decision whether to consent.⁴¹ Furthermore, unless the passenger has knowledge of the procedure, there is no way to prevent agents from exceeding their authority and searching for something other than weapons and explosives.

Finally, even assuming that the search could be found reasonable, Torbet did not consent to the search, expressly or impliedly, because he neither knew that the procedures allowed the search nor freely chose to submit to the search. In fact, not only did Mr. Torbet not consent to a physical search of his carry-on bag, but also, Mr. Torbet asked to leave the airport and was detained.⁴² Consent that waives a constitutional right must be "freely and voluntarily given; it must not be directly or indirectly the result of coercion."⁴³ Forcing a passenger to choose be-

³⁷ *Id.*; see generally *United States v. Henry*, 615 F.2d 1223, 1228-32 (9th Cir. 1980) (passing on implied consent); *United States v. Homburg*, 546 F.2d 1350, 1352-53 (9th Cir. 1976) (refusing to adopt implied consent doctrine).

³⁸ *Pulido-Baquerizo*, 800 F.2d at 902.

³⁹ *In re F.B.*, 726 A.2d 361, 366 (Pa. 1999) (considering notice an important factor in balancing the parties' interests when evaluating constitutionality of a student search).

⁴⁰ *Edwards*, 498 F.2d at 500 (quoting his own opinion in *Bell*, 464 F.2d at 675).

⁴¹ *Id.*

⁴² *Torbet*, 298 F.3d at 1088.

⁴³ *Albarado*, 495 F.2d at 806.

tween his right to travel and his right to remain free from unreasonable searches is a form of coercion.⁴⁴

[W]e doubt that the government could extract so broad a consent as a condition for boarding an airplane. . . [S]hould the government decide to screen all passengers on trains, buses or cars, such a procedure could not be upheld on grounds of implied consent, in the absence of a constitutionally sufficient justification. Any other conclusion not only offends common sense, but flies in the face of the most fundamental Fourth Amendment principle that the government cannot avoid the restrictions of the Fourth Amendment by notifying the public that all telephone lines would be tapped or that all homes would be searched.⁴⁵

Additionally, forcing a passenger to elect not to fly imposes considerable hardship on passengers who must find alternate transportation, assuming that there are alternate forms of transportation available.⁴⁶ As the Ninth Circuit aptly stated, “[t]he true voluntariness of an airport search is doubtful in any event. . . A passenger is not, of course, compelled to travel by airplane, but many travelers would reasonably conclude that they had no realistic alternative.”⁴⁷

No one discounts the tragic events of September 11, 2001, or the terrorist attacks that preceded them; however, what seems reasonable in the aftermath of those attacks cannot be used to justify a search that predated those events by three years.

Among deprivations of rights, none is so effective in cowering a population, crushing the spirit of the individual and putting terror in every heart. Uncontrolled search and seizure is one of the first and most effective weapons in the arsenal of every arbitrary government. And one need only briefly to have dwelt and worked among a people possessed of many admirable qualities but deprived of these rights to know that the human personality deteriorates and dignity and self-reliance disappear where homes, persons and possessions are subject at any hour to unheralded search and seizure by the police.⁴⁸

Random, physical searches of carry-on luggage following x-ray searches that do not arouse suspicion violate the Fourth Amend-

⁴⁴ *Id.* at 806-07.

⁴⁵ *\$124,570 U.S. Currency*, 873 F.2d at 1247.

⁴⁶ *Albarado*, 495 F.2d at 807.

⁴⁷ *\$124,570 U.S. Currency*, 873 F.2d at 1248 n.8.

⁴⁸ *Edwards*, 498 F.2d at 503 n.2 (Oakes, J., concurring).

ment of the United States Constitution because a passenger unaware of the current procedures, and unable to avoid them, cannot consent, expressly nor impliedly.